Shanta Holdings Sdn Bhd v Golden Uni-Consortium Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S–02–868 OF 2005
JAMES FOONG, RAUS SHARIF AND ABDULL HAMID EMBONG JJCA
23 AUGUST 2007

Companies and Corporations — Shares — Sale of shares — Compulsory acquisition — Respondent acquiring 90.1% nominal value of shares in transferor company — Notice given to minority to acquire its shares — Filing of application for compulsory acquisition was before three months period — Whether premature — Companies Act 1965 s 180

Companies and Corporations — Shares — Valuation — Majority shareholders accepted offer price — Minority refused — Whether value of shares was unjustified or manifestly lower than value asked for by minority

Aumkar Plantations Sdn Bhd (the transferor company) had an authorized share capital of RM50,000,000 divided into 50,000,000 ordinary shares of RM1 each, of which 30,500,000 shares have been issued and fully paid up. The 30,500,000 ordinary shares were held by 11 corporate entities, including the appellant who held 3,046,485 ordinary shares representing 9.9% in nominal value in the share capital of the transferor company. On 10 January 2005, one Heinz Fochem on behalf of a consortium of European and American investors made an offer to all the shareholders of the transferor company to acquire their shares. The offer was either a cash payment of RM2.05 per ordinary share of nominal value RM1 per share to those shareholders who wish to liquidate their shareholdings immediately on completion of legal share transfer formalities or a chance to invest in the new investment company, set up to acquire the total ordinary shares paid up capital of Aumkar Plantations Sdn Bhd. On 21 February 2005, the shareholders of the transferor company in which the shareholders holding 90.1% of the shares voted in favour of accepting the offer in an extraordinary general meeting ('EGM'). The appellant voted against it. Subsequent to this EGM, the appellant's solicitors wrote a letter to the transferor's company declaring that the appellant was prepared to accept the offer to purchase its shares at RM5.50 per share. On 14 February 2005, the respondent was incorporated under the Companies Act 1965 ('the Act') by the intending purchasers for the sole purpose of acquiring the whole of the paid up shares in the transferor company. On 17 May 2005, the respondent entered into separate sale and purchase agreements with the approving shareholders for the sale and purchase of 27,453,515 of ordinary shares representing 90.1% in nominal value of those shares in the transferor company. And on 29 June 2005, the 27,453,515 ordinary shares were duly transferred to the respondent. On 30 June 2005 the respondent served on the appellant a notice, pursuant to section 180(3) of the Act, notifying the appellant that they had acquired those shares which comprise of nine-tenths in nominal value of the ordinary shares in the transferor company and the appellant may, within three months required the

transferee company to acquire its holding of 3,046,485 ordinary shares in the transferor company, and the transferee company will be entitled and bound to acquire those shares. On 4 July 2005, the respondent took out originating summons for the compulsory acquisition of the respondent's minority share in the transferor company. The High Court allowed the respondent's application in the terms of the originating summons which declared that the respondent was entitled to acquire the appellant's entire shareholding. Dissatisfied with this decision, the appellant appealed. The appellant contended that: (i) the respondent's application was premature in that it was filed well before the three months accorded by s 180(3)(b) of the Act; (ii) the High Court erred in concluding that the price of RM2.05 per share in the transferor company held by the appellant was not patently unfair and unreasonable.

Held, dismissing the appeal:

(1) Section 180(3) of the Act required different treatment from that of s 180(1) of the Act since it catered for a different situation in the compulsory acquisition of minority shares holders in a transferor company by a transferee company. Section 180(1) provision covered the initial period where there was an offer to purchase the entire shareholdings of the transferor company and the majority of the consenting shareholders, equivalent to nine-tenth in total value of the transferor company, had yet to transfer their respective shares to the transferee company. This was unlike the situation in s 180(3), where the shares of the consenting majority shareholders, equivalent to nine-tenth in total value of the transferor company, had already transferred their shares to the transferee company (see paras 14 & 16).

(2) In this instance, the transferee company desired to acquire the shares of the minority shareholders. This was not a case where the transferee company had to be forced upon to acquire these shares after it had acquired the shares of the majority. The appellant was also prepared to part with its shares except at a higher price when the appellant gave a counter notice to the respondent to acquire its shares. These clearly implied that the appellant had from the very beginning to the end of the three-month period after the notice by the respondent under s 180(3)(a) of the Act, intended and had notified the respondent to acquire its minority shares in the transferor company (see para 19).

(3) The technical objection now raised by the appellant that the respondent should have delayed in filing its application was an attempt to extract from the respondent the price insisted on by the appellant for its shares. It served no purpose since the respondent was willing and ready to acquire the appellant's minority shares and to leave the price of the shares to be decided by the court. Hence, whether the filing of the application was before or after the appellant had given counter notice to the respondent made very little difference. The appellant was never prejudiced when the respondent's application was made before the receipt of the counter notice from the appellant (see para 19).

(4) Each party in this action traded different views and angles in analyzing their respective valuation reports to support their cause. Faced with this, the court

agreed with the approach of the learned trial judge who insisted that unless there was evidence advanced by the appellant to show that the price offered and accepted by the majority of the shareholders who made up of nine-tenths of the total value of the shares was totally unjustified or was manifestly lower than the value asked for by the respondent or that the respondent was acting in bad faith in the sense that its objective was for some sinister purpose obtained by devious means, then the price for the appellant's share should be that as offered and accepted by the majority shareholders who consented (see para 23); *Re Hoare and Company Limited* (1934) TLT 374 referred.

[Bahasa Malaysia summary

Aumkar Plantations Sdn Bhd ('syarikat pemindah') mempunyai modal yang dibenarkan sebanyak RM50,000,000 dibahagi kepada 50,000,000 saham-saham biasa RM1 setiap satu, dimana 30,500,000 saham-saham tersebut telah dikeluarkan dan dibayar sepenuhnya. Saham biasa sebanyak 30,500,000 dipegang oleh 11 entiti korporat, termasuk perayu yang memegang 3,046,485 saham-saham biasa yang mewakili 9.9% nilai nominal modal saham syarikat pemindah. Pada 10 Januari 2005, satu Heinz Fochem bagi pihak konsortium pelabur-pelabur Eropah dan Amerika telah membuat tawaran kepada kesemua pemegang-pemegang saham syarikat pemindah untuk memperolehi saham-saham mereka. Tawaran tersebut adalah antara bayaran tunai RM2.05 bagi setiap saham biasa dengan nilai nominal RM1 setiap saham kepada pemegang-pemegang saham yang ingin menghapuskan pemegangan saham mereka dengan segera selepas pemyempurnaan formaliti pemindahan saham-saham secara sah atau peluang melabur di syarikat pelaburan baru, yang ditubuhkan untuk memperoleh keseluruhan modal berbayar saham-saham biasa Aumkar Plantations Sdn Bhd. Pada 21 Februari 2005, pemegang-pemegang saham syarikat pemindah di mana pemegang-pemegang sahamnya memegang 90.1% saham-saham mengundi menyokong tawaran tersebut di satu mesyuarat agung luar biasa ('MALB'). Perayu mengundi terhadapnya. Selepas MALB tersebut, peguamcara perayu menulis surat kepada syarikat pemindah menyatakan bahawa perayu bersedia menerima tawaran untuk membeli sahamnya pada RM5.50 setiap saham. Pada 14 Februari 2005, responden ditubuhkan di bawah Akta Syarikat 1965 ('Akta tersebut') oleh pembeli yang berniat bagi tujuan tunggal untuk memperoleh kesemua saham-saham berbayar di syarikat pemindah. Pada 17 Mei 2005, responden memasuki perjanjian-perjanjian jual beli yang berasingan dengan pemegang-pemegang saham yang menyokong untuk pembelian dan penjualan 27,453,515 saham-saham biasa yang mewakili 90.1% nilai nominal saham-saham di syarikat pemindah. Dan pada 29.6.2005, 27,453,515 saham-saham biasa dipindahkan kepada responden. Pada 30 Jun 2005 responden menyerahkan notis kepada perayu mengikut s 180(3) Akta tersebut, memberitahu perayu bahawa mereka telah memperoleh saham-saham yang mewakili 9/10 nilai nominal saham-saham biasa di syarikat pemindah dan perayu boleh, dalam masa tiga bulan menghendaki syarikat pemindah untuk memperoleh pegangannya sebanyak 3,046,485 saham-saham biasa di syarikat pemindah, dan syarikat pemindah berhak dan terpaksa memperoleh saham-saham tersebut. Pada 4 Julai 2005, responden mengeluarkan satu saman pemula untuk pengambilan secara paksa saham minoriti responden di syarikat pemindah. Mahkamah Tinggi membenarkan permohonan

responden mengikut terma-terma di saman pemula yang menyatakan bahawa responden berhak memperoleh keseluruhan pegangan saham perayu. Tidak puas hati dengan keputusan tersebut, perayu merayu. Perayu menegaskan bahawa: (i) permohonan responden adalah pra-masa oleh kerana ia difailkan sebelum tiga bulan yang diberikan oleh s 180(3)(b) Akta tersebut; (ii) Mahkamah Tinggi terkhilaf dalam menyimpulkan bahawa harga RM2.05 setiap saham di syarikat pemindah yang dipegang oleh perayu bukan jelas tidak adil dan tidak munasabah.

Diputuskan, menolak rayuan tersebut:

(1) Seksyen 180(3) Akta tersebut memerlukan pendekatan yang berlainan daripada seksyen 180(1) Akta tersebut oleh kerana ia adalah untuk keadaan yang berlainan dalam pengambilan secara paksa pemegang saham minoriti di syarikat pemindah oleh syarikat terpindah. Peruntukan s 180(1) meliputi tempoh masa awal dimana terdapat tawaran untuk membeli kesemua pegangan saham di syarikat pemindah dan majoriti pemegang-pemegang saham yang bersetuju, yang berjumlah 9/10 keseluruhan nilai syarikat pemindah, masih belum lagi memindah saham-saham mereka masing-masing kepada syarikat dipindah. Ini adalah berlainan daripada keadaan di s 180(3), dimana saham-ssaham pemegang-pemegang saham majoriti yang bersetuju, yang berjumlah 9/10 keseluruhan nilai syarikat pemindah, telahpun memindahkan saham-saham mereka kepada syarikat dipindah (lihat perenggan 14 & 16).

(2) Dalam kes ini, syarikat dipindah berhasrat untuk memperoleh saham-saham minoriti. Ia bukannya satu kes di mana syarikat pemindah dipaksa untuk memperoleh saham-saham tersebut selepas ia memperoleh saham-saham majoriti. Perayu juga bersedia untuk melepaskan saham-sahamnya kecuali pada harga yang lebih tinggi apabila perayu memberikan notis balas kepada responden untuk memperoleh saham-sahamnya. Ini jelas membayangkan bahawa perayu telah dari mulanya sehingga akhir jangkamasa tiga bulan selepas notis oleh responden di bawah s 180(3)(a) Akta tersebut, berhasrat dan telah memaklumkan kepada responden untuk memperoleh saham-saham minoritinya di syarikat pemindah (lihat perenggan 19).

(3) Bantahan teknikal yang dibangkitkan oleh perayu sekarang bahawa responden sepatutnya melambatkan dalam memfailkan permohonannya adalah satu percubaan untuk mendapatkan daripada responden harga yang ditegaskan oleh perayu untuk saham-sahamnya. Ia tidak mempunyai sebarang tujuan oleh kerana responden sanggup dan bersedia untuk memperoleh saham-saham minoriti perayu dan meninggalkan harga saham-saham tersebut untuk ditentukan oleh mahkamah. Dengan itu, sama ada pemfailan permohonan tersebut dibuat sebelum atau selepas perayu memberikan notis balasannya kepada responden tidak membuat banyak perbezaan. Perayu tidak diprejudiskan apabila permohonan responden dibuat sebelum penerimaan notis balasan daripada perayu (lihat perenggan 19).

(4) Setiap pihak kepada tindakan ini memberi pandangan yang berbeza dalam menganalisis laporan-laporan penilaian untuk menyokong kausa mereka. Berhadapan dengan ini, mahkamah bersetuju dengan pendekatan hakim

mahkamah tinggi yang bijaksana yang menegaskan bahawa kecuali terdapat bukti yang dilampirkan oleh perayu untuk menunjukkan harga tawaran dan penerimaan majoriti pemegang-pemegang saham yang berjumlah 9/10 keseluruhan nilai saham-saham adalah langsung tidak berjustifikasi ataupun terlampau rendah daripada nilai yang dikehendaki responden ataupun responden telah bertindak dengan niat jahat iaitu objektifnya adalah untuk tujuan yang sinis yang diperoleh dengan cara yang licik, maka harga untuk saham perayu sepatutnya sama dengan yang ditawarkan dan diterima oleh majoriti pemegang-pemegang saham yang bersetuju (lihat perenggan 24); *Re Hoare and Company Limited* (1934) TLT 374 dirujuk.]

Notes

For cases on sale of shares, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 886–902.

Cases referred to

Hoare and Company Limited, Re (1934) TLT 374 (refd)
Sussex Brick Co Ltd, Re [1960] 1 All ER 772 (refd)
Western Manufacturing (Reading), Re [1956] 1 Ch 436 (refd)

Legislation referred to

Companies Act 1965 s 180(1), (3)(b)

Ho Kin Kong (Rosslin P Rosen with him) (Ting Rosen & Co) for the appellant.
Jeyan Marimuttu (Claudia A Lopez with him) (J Marimuttu & Partners) for the respondent.

James Foong JCA (delivering judgment of the court):

INTRODUCTION

[1] The facts of this case are substantially undisputed and are as follows: At all material time, Aumkar Plantations Sdn Bhd ('the transferor company') has or has had an authorized share capital of RM50,000,000 divided into 50,000,000 ordinary shares of RM1 each, of which 30,500,000 shares have been issued and fully paid up.

[2] The 30,500,000 ordinary shares were held by 11 corporate entities, including the appellant who holds or has held 3,046,485 ordinary shares representing 9.9% in nominal value in the share capital of the transferor company.

[3] On 10 January 2005, one Heinz Fochem on behalf of a consortium of European and American investors made an offer to all the shareholders of the transferor company to acquire their shares. The offer was as follows:

(a) cash payment of RM2.05 per ordinary share of nominal value RM1 per share to those shareholders who wish to liquidate their shareholdings immediately on completion of legal share transfer formalities or;

(b) for every 100 ordinary shares of par value RM1 per share held by Aumkar Plantations Sdn Bhd shareholders, these shareholders will receive in a new investment company, set up to acquire the total ordinary shares paid up capital of Aumkar Plantations Sdn Bhd the following:

(i) Fully paid up 10 ordinary shares of par value RM1 per share, and

(ii) Fully paid up 200, 5% Redeemable Year 2008–2010 at par value, preference shares of par value RM1 per share. The preference shares will not carry any voting rights

[4] On 21 February 2005, an extraordinary general meeting ('EGM') of the shareholders of the transferor company was held in which the shareholders holding 90.1% of the shares voted in favour of accepting the offer. The appellant voted against it.

[5] Subsequent to this EGM, the appellant's solicitors, M/s Mahinder Singh Dulku & Co, wrote a letter to the transferor's company declaring that the appellant is prepared to accept the offer to purchase its shares at RM5.50 per share.

[6] On 14 February 2005, the respondent was incorporated under the Companies Act 1965 by the intending purchasers for the sole purpose of acquiring the whole of the paid up shares in the transferor company.

[7] On 17 May 2005, the respondent entered into separate sale and purchase agreements with the approving shareholders for the sale and purchase of 27,453,515 of ordinary shares representing 90.1% in nominal value of those shares in the transferor company. And on 29 June 2005, the 27,453,515 ordinary shares were duly transferred to the respondent

[8] On 30 June 2005 the respondent served on the appellant a notice, pursuant to s 180(3) of the Companies Act 1965, notifying the appellant that they had acquired those shares which comprise of nine-tenths in nominal value of the ordinary shares in the transferor company and the appellant 'may, within three months from the giving of this notice, give notice that you require the transferee company to acquire your holding of 3,046,485 Ordinary Shares in the transferor company, and if you give that notice the transferee company will be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed or as the High Court on application made to it by you or by the transferee company thinks fit to order'.

[9] On 4 July 2005, the respondent took out originating summons bearing registration number T (24) 65 of 2005 in the High Court in Sab ah and Sarawak at Tawau (the application and the subject matter of this appeal) with a returnable date of 26 July 2005. On the 27 July 2005, the High Court allowed the respondent's application in the terms of the originating summons which declared that the

respondent is entitled to acquire the appellant's entire shareholding as aforesaid. Dissatisfied with this decision, the appellant appealed to us.

CONTENTIONS OF THE APPELLANT

[10] In this appeal, the appellant raised two contentions:

(1) The respondent's application was premature in that it was filed well before the three months accorded by s 180(3)(b) of the Companies Act 1965.

(2) The High Court has erred in concluding that the price of RM2.05 per share in the transferor company held by the appellant was not patently unfair and unreasonable.

[11] I shall deal with each of these in turn.

First Issue: Is the respondent's application a nullity for reason that it was prematurely filed?

[12] In order to appreciate this issue it is necessary to examine s 180(3) of the Companies Act 1965. It states:

> Where in pursuance of any such scheme or contract shares in a company are transferred to another company or its nominee and those shares together with any other shares in the first-mentioned company held by, or by a nominee for, the transferee company or its subsidiary at the date of the transfer comprise or include nine-tenths in nominal value of the shares in the first-mentioned company or of any class of those shares, then —
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> (a) the transferee company shall within one month from the date of the transfer (unless on a previous transfer in pursuance of the scheme or contract it has already complied with this requirement) give notice of that fact in the prescribed manner to the holders of the remaining shares or of the remaining shares of that class who have not assented to the scheme or contract; and
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> (b) any such holder may within three months from the giving of the notice to him require the transferee company to acquire the shares in question,
>
> and where a shareholder gives notice under paragraph (b) with respect to any shares, the transferee company shall be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed or as the Court on the application of either the transferee company or the shareholder thinks fit to order

[13] It is contended by the appellant that by virtue of this provision, particularly sub-s (b), the appellant has up to three months to give a counter notice to the respondent before the respondent can make an application to the court for compulsory acquisition of the respondent's minority share in the transferor company. The notice date issued by the respondent under s 180(3)(a) of the Companies Act was 30.6.2005, and the application of the respondent to the court was on 4 July 2005. According to the appellant, this was well before the expiration of 3 months for the appellant to give a counter notice to the respondent. In short, what the appellant is arguing is that the respondent's application to the court was premature and thus a nullity. The respondent should have waited until the appellant gives its counter

notice to the respondent within three months before making the application. In the court below, the High Court judge dealt with this matter in this manner:

> There was also the equally unfounded argument that the application was premature in that it was filed well before the three months accorded by s 180(3)(b) for the defendant to exercise its statutory right, unnecessarily muddled as it was by an abstruse interpretation of that provision. In the light of the observations at pp 448–449 of the judgment of Wynn-Parry J in *Re Western Manufacturing (Reading) Ltd* [1956] 1 Ch. 436 the argument must get very short shrift:
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> > In addition to the phrase which I have been considering, there are four somewhat similar periods mentioned in the section. First there is the phrase in sub-section (1): within two months after the expiration of the 'said four months.' Secondly, there is the phrase, also in sub-section (1): within one month from then date on which the 'notice was given.' Thirdly, there is the phrase in subsection (2)(a): 'within one month of the date of transfer'; and fourthly, the phrase in subsection (2)(b): 'within three months from the giving of the notice.' Now, it will be observed that in the case of each of those four phrases the period is the maximum period during any moment of which the event contemplated may occur. In the light of this it would be odd indeed if the first phrase of all had to be construed in a different sense, namely, as describing a fixed period until the expiration of which one must wait in order to see whether the event contemplated has or has not occurred.

[14] Contending that the learned High Court judge has erred in his view on this issue, the appellant highlighted to us that the case cited *Re Western Manufacturing (Reading) Ltd*is in respect to a provision in the English Companies Act which is equivalent to s 180(1) of our Companies Act. What concerns us here is s 180(3) of the Companies Act, particularly sub-s (b). Section 180(3) of the Companies Act requires different treatment from that of s 180(1) of the Companies Act since it caters for a different situation in the compulsory acquisition of minority shares holders in a transferor company by a transferee company.

[15] To understand this, it is necessary to first examine s 180(1) of the Companies Act. It is:

> Where a scheme or contract involving the transfer of all of the shares or all of the shares in any particular class in a company (in this section referred to as the 'transferor company') to another company or corporation (in this section referred to as the 'transferee company') has within four months after the making of the offer in that behalf by the transferee company been approved as to the shares or as to each class of shares whose transfer is involved by the holders of not less than nine-tenths in nominal value of those shares or of the shares of that class (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may at any time within two months after the offer has been so approved give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares and when such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given or within seven days of a statement being supplied to a dissenting shareholder pursuant to subsection (2) (whichever is the later) the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms which, under the scheme or contract the shares of the approving

A shareholders are to be transferred to the transferee company or if the offer contained two or more alternative sets of terms upon the terms which were specified in the offer as being applicable to dissenting shareholders.

[16] One will observe that this provision covers the initial period where there is an B offer to purchase the entire shareholdings of the transferor company and the majority of the consenting shareholders, equivalent to nine-tenth in total value of the transferor company, have yet to transfer their respective shares to the transferee company. This is unlike the situation in s 180(3) of the Companies Act, where the shares of the consenting majority shareholders, equivalent to nine-tenth in total value of the transferor company, had already transferred their shares to the transferee C company.

[17] Now we look at the facts in *Re Western Manufacturing (Reading) Ltd*. The head note of this case reports that:

D On 11 February 1955, W Ltd. issued to its shareholders a circular announcing a scheme for its amalgamation with A Ltd. whereby A Ltd. would acquire the shares in W Ltd. The circular provided that the offer was conditional on being accepted on or before 4 March 1955, or such later date as might be agreed between the two boards, in respect of not less than 90 per cent of the issued shares of W Ltd. By agreement the date for acceptance was extended and, in the result, the holders of over nine-tenths in value of the shares in W Ltd. E accepted the offer. The applicant on this summons held 3,585 shares out of 2,131,104, and in due course A Ltd. served on him, pursuant to s 209(1) of the Companies Act 1948, a notice that it desired to acquire his shares on the terms of the offer contained in the circular. By this summons, issued in July 1955, he asked for an order, pursuant to the subsection, that A Ltd. was not entitled to acquire his shares in W Ltd, or any of the shares therein, on the terms of the scheme or contract dated 11 February 1955, notwithstanding F that the same had been approved by the holders of nine-tenths in value of the shares whereof the transfer was involved. For the applicant it was contended that the offer had to remain open for four months and that it was issued on 11 February 1955, and itself expressly provided that it must be accepted by 4 March 1955.

G **[18]** And it was held:

in deciding that the notice to the applicant was valid and dismissing the summons: that, in s 209(1), the phrase 'within four months after the making of the offer' did not denote a fixed period during the whole of which the offer must remain open, but described a maximum period during which the event contemplated might occur; and that it was competent to A. H Ltd. to fix a period within, but shorter than, the four months, during which the offer must be accepted.

[19] I agree that the judgment in the aforesaid case deals with a provision which is rather similar to s 180(1) of our Companies Act. Nevertheless, the interpretation I on the period of time should equally apply to se 180(3) of the Companies Act. It is the maximum period during any moment of which the event contemplated may occur. And under s 180(3) of the Companies Act, the maximum period is three months for the minority dissenting shareholder to give a counter notice requiring the transferee company to acquire its minority shares. This is in anticipation that the transferee company, after acquiring the consenting majority shares, may refuse to

acquire those of the dissenting minority. This provision is to enable the dissenting minority shareholder to commit the transferee company to acquire its shares at the price accepted by the approving shareholders or if the minority shareholder is still dissatisfied with the price as offered, then for the court to decide what is the fair price. In this instance, the transferee company desired to acquire the shares of the minority shareholders. This is not a case where the transferee company had to be forced upon to acquire these shares after it has acquired the shares of the majority. In short, the respondent here was ready and willing to acquire the appellant's shares. On the part of the appellant, the appellant was also prepared to part with its shares except at a higher price, which of course will be settled by the court when there is a disagreement over it. This willingness of the appellant for the respondent to acquire its shares is reflected in the appellant's solicitors' letter to the transferor company on 9 March 2005 where it asked for RM5.50 per share. This was subsequently reaffirmed by the appellant when the appellant gave a counter notice to the respondent to acquire its shares. Though this was given without prejudice to this appeal and subsequent to the application of the respondent but before the expiry of the three-month period mentioned in s 180(b) Companies Act, the fact remains that the appellant was desirous of the respondent to acquire its shares. These, in my opinion, clearly imply that the appellant had from the very beginning to the end of the three-month period after the notice by the respondent under s 180(3)(a) of the Companies Act, intended and had notified the respondent to acquire its minority shares in the transferor company. The technical objection now raised by the appellant that the respondent should have delayed in filing its application is, to my mind, an attempt to extract from the respondent the price insisted on by the appellant for its shares. It serves no purpose since the respondent was willing and ready to acquire the appellant's minority shares and to leave the price of the shares to be decided by the court. So in this case, whether the filing of the application was before or after the appellant had given counter notice to the respondent makes very little difference. The appellant was never prejudiced when the respondent's application was made before the receipt of the counter notice from the appellant. The appellant was still required to sell its shares to the respondent and in this case, had all along being willing to do so except for the price which, as I have repeatedly said, could be settled by the court when it was not agreed upon. On the part of the respondent, the fact that it has filed this application is an indication that it was more than willing to acquire the appellant's share and was prepared to leave the issue of price to be determined by the court. Under such circumstances, this objection of the appellant must be overruled.

Second Issue: Has the trial judge erred in concluding that the price of RM2.05 per share in the transferor company held by the appellant patently unfair and unreasonable?

[20] Under s 180(3) of the Companies Act, it is stated that after the appellant has given notice to acquire its shares, the respondent 'shall be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares

of the approving shareholders were transferred to it, or on such other terms as are agreed or as the court on the application of either the transferee company or the shareholder thinks fit to order'.

[21] As there was a difference between the amount offered by the respondent (RM2.05 per share) and the demand by the appellant (RM5.50 per share) the learned trial judge decided, following a line of English authorities relating to such matter, that

> It may well be that the defendant's method of valuation is better and that its criticism of the offer is not totally unjustified or it may even be it is manifest that a higher value ought to have been given to the shares but in the absence of any suggestion that the plaintiff is acting in bad faith in the sense that its objective is for some sinister purpose obtained by devious means, the defendant has not established that the offer is unfair.

[22] The offer by the respondent and the demand by the appellant are not arrived at without consultants' opinion. On the side of the respondent, there is the share valuation report ('AAG Report') by M/s Ahmad Abdullah & Goh ('AAG'), a firm of chartered accountants. This report came about after the transferor company held its 2004 Annual General Meeting where a shareholder desired to dispose off his entire shareholdings. It was then agreed that AAG be appointed to evaluate the shares to be sold. AAG Report states that the price ranges between RM1.21 to RM1.38. The AAG Report was then given to M/s KPMG ('KPMG') a firm of chartered accountants based in Sandakan, Sabah. KPMG came up with a draft report ('KPMG draft report') to say that by their methodology in calculating share value of the transferor company which is based on a 'break up' value basis, the value per share is RM3.34. There is no final report from KPMG. The KPMG report was then forwarded to AAG who commented on a number of shortcomings in the manner KPMG arrived at its conclusion. Subsequent to the 2004 Annual General Meeting of the transferor company, certain shares in the company were transacted. They ranged between RM1 per share to RM2.05 per share. There was an attempt to resolve the difference between the price demanded by the appellant and that offered by the respondent by appointing an independent chartered accountant recommended by the Malaysian Institute of Accountants to determine the fair value of the appellant's minority shares. But this fell through when the appellant insisted on appointing an independent auditor nominated by the respondent and agreed to by the transferor company and whatever value determined by this valuer would be sale price of the appellant's shares. The transferor company however maintained its original position.

[23] With this impasse, each party in this action traded different views and angles in analyzing their respective valuation reports to support their cause. Faced with this, I agree with the approach of the learned trial Judge who insisted that unless there is evidence advanced by the appellant to show that the price offered and accepted by the majority of the shareholders who make up of nine-tenths of the total value of the shares is totally unjustified or is manifestly lower than the value asked for by the respondent or that the respondent was acting in bad faith in the sense that its objective is for some sinister purpose obtained by devious means, then the price for the appellant's share should be that as offered and accepted by the majority

shareholders who consented. This approach is not without support. In *Re Hoare and Company Limited* (1934) TLT 374, Justice Maugham has this to say:

> The other conclusion I draw is this, that again prima facie the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned. Accordingly, without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders, the scheme is unfair.

[24] The other case is *Re Sussex Brick Co Ltd* [1960] 1 All ER 772 at p 774 where Vaisey J declared:

> I think that the scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. I do not think that merely finding items in the scheme or details of the scheme which are open to valid criticism is enough. A scheme can be effective to bind a dissenting shareholder without complying to the extent of one hundred per cent with the highest possible standards of fairness, equity and reason.

[25] In this case, the learned trial judge has correctly observed that on the evidence as presented, the price of RM2.05 per share offered by the respondent is not totally unjust and manifestly lower than the value asked for by the appellant. Though the appellant's claim is supported by the KPMG draft report which questioned the AAG Report, nevertheless the subsequent clarification by AAG had provided reasonable explanation to the queries raised. Further, there were actual transactions of shares in the transferor company other than those between the respondent and majority approving shareholders at the material time to reflect the actual consideration paid for the shares in the transferor company. This has an important bearing on the price of the shares. It gives a true reflection of the actual value of the shares transacted. This leads me to share the same conclusion as the learned trial Judge that the fair price for the appellant's shares is RM2.05 per share.

CONCLUSION

[26] In conclusion, this appeal is dismissed with costs. My brothers Raus Sharif and Abdull Hamid Embong JJCA have read this judgment in draft and concurred with the contents therein.

Appeal dismissed.

Reported by Sally Kee